**RE: Rule 1-400**
**5/7&5/8 Commission Meeting**
**Open Session Item III.A.**

Original Message-----
From: Kevin Mohr [mailto:kemohr@comcast.net]
Sent: Thursday, March 25, 2004 11:30 AM
To: McCurdy, Lauren
Cc: Edward P. George; JoElla L. Julien; Ignazio J. Ruvolo; Difuntorum, Randall; Harry Sondheim; Paul Vapnek; Mark Tuft; Kevin Mohr; Kevin Mohr; Kevin Mohr
Subject: RRC - Rule 1-400 - MR Template Draft 1 - REVISED

Greetings Lauren:

As we just discussed, I've attached revised versions of the first draft of our ad & solicit rules using the Model Rules as a template. There is a clean version in WP and a red-line, comparing draft 1 to the current Model Rules 7.1 to 7.6, in both WP and PDF. I've also attached a four-page document that sorts the current rule 1-400 standards by the model rules to which they are most closely related. That is in WP.

I've made the following changes to the draft to the drafting team earlier this week:

1. I've deleted the rule 1-400 standards from the draft to reduce the "clutter" effect. See the four-page attachment for how the standards related to each model rule.

2. I've deleted the model rule comments from the rules. We were charged on this round with addressing the rules only. This also reduces clutter.

3. We were also charged with keeping the ABA language unless there was a good reason for not doing so. In some instances, I have substituted language from California rules because I thought they increased clarity. I've flagged each instance in which I've done that and included the ABA language for comparison in the endnote.

4. In the end notes, I have often given my recommendation for what language to use when there is a question. In other instances, I had no recommendation.

I think that about covers it. Thanks much for your great work in putting this mailing together.

Kevin

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## RULE 7.0. DEFINITIONS[1]

(a) For purposes of this chapter, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a member's law firm directed to any former, present, or prospective client, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, **domain name**, or other professional designation of such member or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, **internet web page or web site, e-mail, or other written document sent by electronic transmission,** or other comparable written material describing such member, law firm, or lawyers; or

(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or

(4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

(b) For purposes of this chapter, "Advertise" or "advertisement" means any communication, disseminated by television or radio, **or any other electronic medium, including a computer network**,[2] or by any print medium including, but not limited to, newspapers and billboards, or by means of a mailing directed generally to members of the public and not to a specific person, that solicits employment of legal services provided by a member, and is directed to the general public and is paid for by, or on the behalf of, an attorney.

(c) For purposes of this chapter, **to "solicit" or** a "solicitation" means **the initiation of**[3] any communication:

(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and

(2) Which is:

(a) delivered in person or by **live**[4] telephone, **or through real-time electronic contact**,[5] or

(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

(D) "Electronic medium" **includes, without limitation,** ~~means~~ television, radio, ~~or~~ **and** computer networks."[6]

## RULE 7.1. COMMUNICATIONS CONCERNING A MEMBER'S[7] SERVICES

(a) A member shall not make a false or misleading communication about the member or the member's services.[8]

(b) A communication is false or misleading if it:[9]

(1) Contains any [**material**][10] untrue statement; or

(2) Contains any matter, or present or arrange any matter in a manner or format which is [**materially**] false, deceptive, or which confuses, deceives, or misleads the public; or

(3) Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not [**materially**] misleading to the public.

(c) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.[11]

(d) A member shall retain for two years [one year] a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.[12]

**Comment**[13]

## RULE 7.2. ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a member may advertise services through written, recorded or electronic communication, including public media.

(b) A member shall not give anything of value to a person for recommending the member's services except that a member may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;[14]

(2) pay the usual charges of a plan or a not-for-profit or qualified lawyer referral service.[15] A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;[16]

(3) pay for a law practice in accordance with rule 2-300; and

(4) refer clients to another member or a nonmember professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the member, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.[17]

(c) Any communication made pursuant to this rule shall include the name and office address of at least one member or law firm responsible for its content.[18]

## RULE 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS[19]

(a) A member shall not by in person or, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the member's doing so is the member's pecuniary gain, unless [**the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California or**][20] the person contacted:

(1) is a lawyer;[21] or

(2) has a family, **close personal**,[22] or prior professional relationship with the member.

(b) A member shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or **real-time electronic contact**[23] even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the member a desire not to be solicited by the member; or

(2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.[24]

(c) Every written or, recorded or electronic communication from a member soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).[25]

(d) Notwithstanding the prohibitions in paragraph (a), a member may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the member that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.[26]

## RULE 7.4. COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION[27]

(a) A member may communicate the fact that the member does or does not practice in particular fields of law.[28]

(b) A member admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;[29]

(c) A member engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A member shall not state or imply that a member is certified as a specialist in a particular field of law, unless:

(1) the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors; and

(2) the name of the certifying organization is clearly identified in the communication.[30]

## RULE 7.5. FIRM NAMES AND LETTERHEADS

(a) A member shall not use a firm name, letterhead or other professional designation that violates Rule 7.1.[31] A trade name may be used by a member in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.[32]

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation[33] in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.[34]

(c) The name of a member holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the member is not actively and regularly practicing with the firm.[35]

(d) A member may state or imply that the member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 only when such relationship in fact exists.[36]

(e) A member may state or imply that the member or member's law firm is "of counsel" to another lawyer or a law firm only if the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172) which is close, personal, continuous, and regular.[37]

## RULE 7.6. POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES[38]

## ENDNOTES

1. The Commission voted on 12/12/03 to include a separate definitions section. These are the definitions that were in the previous draft (5A). Question: Should a definitions section be included now that the Commission has voted (on 2/20/04) to use the MR's as a template? Please note: The definitions have not been modified since draft 5A was circulated before the 12/12/03 meeting. There were some suggested changes made at that meeting, but they have not been incorporated.

> **KEM Recommendation**: Do not include definitions section, but if Commission decides to do so, do not include definition for "solicit" as MR 7.3 adequately identifies the kind of conduct that is prohibited.

2. Reference to "any other electronic medium" has been added to the definition from B & P Code § 6157. There may be a preference to simply refer to "the Internet" rather than "Computer Network".

3. **KEM Recommendation:** Delete reference to "the initiation of", as (2)(a) states the solicitation must be "delivered" and (2)(b) states that it is "directed ... to a person".

4. **KEM Recommendation**: Include "live" has been added here for uniformity, as **Model Rule 7.3** refers to "live" telephone contact. Comment 2 to MR 7.3 impliedly approves of *pre-recorded* messages: "Advertising and written and recorded communications which may be mailed or *autodialed* make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in person, telephone or real-time electronic persuasion that may overwhelm the client's judgment." (Emphasis added).

5. **MR 7.3** uses "real-time electronic contact" to reach situations, such as chat rooms and instant messaging, that provide the same kind of pressure (as in-person and telephonic communications) that presumably denies the client time for reflection in deciding which lawyer to retain.

6. **B & P Code § 6157(d)** has been changed to anticipate future "electronic media". Need to note in Final Report that the B & P Code would also have to be amended. Suggestion was made to change "computer network" to "the Internet". **Question**: Would that change be too limiting? **KEM Recommendation**: Do not include definition for "electronic medium".

7. I've changed "lawyer" to "member" in the ABA rules. **Question**: Should we do that? One of the reasons for going with the ABA format is that it promotes uniformity and consistency amongst the states in an area that may require those traits in light of the Internet and MJP. Do we want to limit these rules to "member"? It probably does not matter; if these rules end up like the rules from other states, then the out-of-state lawyer would have violated her home state's rules on advertising.

8. **KEM Note**: I've split MR 7.1's two sentences into two paragraphs. The two thoughts are distinct. Paragraph (a) states what is prohibited. Paragraph (b) defines the prohibited conduct. It struck me as cleaner that way. **Question**: Do you agree with that format change?

9. **KEM Note**: I've substituted current 1-400(D)(1)-(3) for the second sentence of ABA MR 7.1, which provides: "A communication is false or misleading if it contains a **material** misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." **KEM Recommendation**: The drafting team's charge was to use the ABA language unless there's a good reason not to use it. I think that 1-400(D)(1)-(3), although not as succinct as the ABA's, adds clarity to what is prohibited and would recommend using that language.

10. **Question**: Should California include the modifiers "material" and "materially" as does the ABA?

11. Paragraph (c) [which is current 1-400(E)] was placed here because it refers generally to "communications". **Two Questions**: (1) Should this provision about standards be kept? (2) Is this a concept that is necessary now that the field of lawyer communications is better developed? **KEM Recommendation**: Probably should keep the standards, but in the Discussion. Question re the effect this may have on the standards' presumptive effect.

12. Paragraph (e) [now 1-400(F)] has been placed here because it refers generally to "communications" and not "advertisements" or "solicitations". **Questions:** Should this requirement be (1) kept in the rule or (2) limited to one year? On the one hand, B & P § 6159.1 requires retention of advertisements for only one year. On the other hand, the ABA has removed the record requirement for advertisements altogether. The Reporter's Explanation of Changes for MR 7.2 states:

> "The requirement that a lawyer retain copies of all advertisements for two years has become increasingly burdensome, and such records are seldom used for disciplinary purposes. Thus the Commission, with the concurrence of the ABA Commission on Responsibility in Client Development, is recommending elimination of the requirement that records of advertising be retained for two years."

13. **KEM Note**: I've redacted the ABA Comments as the drafting for the drafting team's charge was to focus on the black-letter rule only in this draft. We will insert the comments for the next round.

14. **Rule 1-320(C)** provides: "(C) A member shall not compensate, give, or promise anything of value to any representative of the press, radio, television, or other communication medium in anticipation of or in return for publicity of the member, the law firm, or any other member as such in a news item, but the incidental provision of food or beverage shall not of itself violate this rule." The **Discussion to rule 1-320** provides: "Rule 1-320(C) is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment."

> **KEM Recommendation**: I see no reason to use the California language rather than the ABA language. Note, however, that some of the provisions of 1-320 have been incorporated into proposed rule 1-310-X. *See note 17, below.*

15. **Cal. B&P Code §6157.4** ("Lawyer Referral Service Advertisements -- Necessary Disclosures") provides: "Any advertisement that is created or disseminated by a lawyer referral service shall disclose whether the attorneys on the organization's referral list, panel, or system, paid any consideration, other than a proportional share of actual cost, to be included on that list, panel, or system." **KEM Recommendation**: I see no reason not to use the ABA language here.

16. The second sentence of ABA MR 7.3(b) provides: "A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority." We substituted language that has been developed in the 2/20/04 draft of proposed rule 1-310-X. The Commission should also consider X-referencing B&P Code § 6155.

17. Paragraph (b)(4), which was added to MR 7.2 after the Ethics 2000 Final Report (in 8/2002), combines concepts now found in two California Rules:

> Rule 1-320(B) ("(B) A member shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any person or entity having made a recommendation resulting in the

employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.") **Note** that rule 1-320(A) addresses fee-sharing w/ a non-lawyer. *Cf.* MR 5.4(a).

Rule 2-200 ("(B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.") **Note** that rule 2-200(A) addresses fee splitting w/ another lawyer. *Cf.* MR 1.5(e).

**Three Questions**: (**1**) Do the drafters want to keep these two concepts (compensation to lawyers and non-lawyers for referrals) separate in the aforementioned rules? (**2**) Does the MR approach of including the both concepts in a single rule that is placed with other provisions addressing payment for advertising sufficiently capture the gist of 1-320(B) and 2-200(B)? **Note**: With the current draft of 1-310-X, the Commission is already moving in the direction of the ABA approach, i.e., the substance of 1-320(A) [fee sharing w/ non-lawyers] has already been moved to the rule on "independence of judgment". (**3**) Should 2-200(A) be moved to rule 4-200 ("Fees for Legal Services"). The ABA provision re fee-splitting w/ another lawyer is in MR 1.5(e). MR 1.5 is the model rule analogous to rule 2-200 ("Fees").

**KEM Recommendations**: (1) Do not keep separate rules. Move 1-320(B) and 2-200(B) into this rule, and use the ABA language. 1-320(A) is already being moved to proposed rule 1-310-X and 2-200(A) can be moved into rule 4-200 ("fees for legal services"). 1-320(A) is covered by this rule's subparagraph (b)(1). *See note 14.* (2) The MR's approach of including both concepts in this rule's subparagraph (b)(4) makes sense. Alternative: If Commission decides to keep the concepts in two separate rules, then the Discussion should read something like: "California has not adopted Model Rule 7.3(b)(4). The concepts expressed in that provision may be found in [rule 1-320(B)] and [2-200(B)] (or whatever numbers these rules eventually have). (3) If Commission agrees to move 2-200(B) into this rule, then 2-200(A) should be moved into 4-200.

18. **Standard (12)** to rule 1-400 provides: "(12) A 'communication,' except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it." **KEM recommendation**: There is no good reason to use the California language instead of the ABA language. Use the ABA provision. Perhaps note in the Discussion that "former Standard (12) to rule 1-400 provided ...."

19. This rule addresses what is denominated in current rule 1-400 as "solicitation". As you read the rule, please note that it accomplishes what 1-400(C), which prohibits solicitations, without defining solicitation. That is because the concept covered by the definition set out above in rule 7.0(c) – uninvited live (in-person or telephonic) contact with a prospective client – is covered by the different provisions of the rule. Therefore, the Commission might consider not including a definition for "solicitation".

20. The bolded language is taken from current rule 1-400(C). **Question**: Does it need to be included? **KEM Recommendation**: Do not include the language, which appears to be a vestige of a time (late 1970s, following *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 97 S.Ct. 2691) when the field of lawyer advertising was an unknown. It is a given that if the communication is protected under the First Amendment or the California Constitution, discipline cannot be imposed. It does not add much to the rule in terms of guidance.

21. A suggestion was made in an earlier draft to include the following, separate paragraph in place of (a)(1): "Direct lawyer-to-lawyer communications shall not be prohibited." **KEM Recommendation**: The ABA language adequately communicates that live contact with other lawyers is permitted. No good reason not to use the language.

22. California does not at present have the "close personal" modifier of "relationship. **KEM Recommendation**: include. As Harry noted in his 12/9/03 e-mail, "it encompasses relationships that are not 'family' dependent, e.g., roommate, lover, etc," but which are nevertheless relevant to the concern of this rule that the lawyer may overreach.

23. The concept of "real time electronic contact" is intended to reach technologies such as "chat rooms," which presumably involve real time electronic communication and therefore the threat of overreaching by the lawyer, but which are not covered by the current language of 1-400 which refers only to communications "delivered in-person or by telephone." See also Ethics 2000 Reporter's Explanation of Changes to Model Rule 7.3 ("Differentiating between e-mail and real-time electronic communication, the Commission has concluded that the interactivity and immediacy of response in real-time electronic communication presents the same dangers as those involved in live telephone contact.") **KEM Recommendation**: Include the language.

24. **Note 1**: MR 7.3(b)(2) reads: "the solicitation involves coercion, duress or harassment." I have replaced that language with the bolded language taken from 1-400(D)(5) and included it in (b)(2). Rule 1-400(D)(5)'s language struck me as a better statement of the kind of conduct that the rule is attempting to prohibit. *See also* rule 1-400, Standards (3) and (4), which address specific conduct. **KEM Recommendation**: Standards (3) and (4) can be included in the Comment to rule 7.3.

**Note 2**: The one concept contained in 1-400's definition of "solicitation" that is not included in Model Rule 7.3 is 1-400(B)(2)(b), which prohibits a communication for pecuniary gain that is "directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication." **KEM Recommendation**: Do not include this concept in a rule on solicitation. The conduct is already covered under 2-100 ("Communication with a Represented Party"). Although rule 2-100 is limited to "parties," the Commission may decide that its protections should be extended to any represented person. *Cf.* Model Rule 4.2 ("Communication with Person Represented by Counsel").

25. Rule 1-400(D)(4) provides: "A communication or a solicitation (as defined herein) shall not: * * * (4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be." **KEM Note**: Paragraph (c) addresses direct-targeted mailings to prospective clients (e.g., a mass disaster such as a plane crash, where the lawyer specifically targets the survivors or surviving family of the deceased. These situations are hybrid situations. On the one hand, they are not advertisements that are intended for the general public. On the other hand, they do not raise the identical concerns re overreaching that live contact with prospective clients do. Nevertheless, they may involve some of the concerns with solicitation, for example, the lawyer would likely realize that the day after a disaster the surviving family members are in a tenuous emotional state and might not be in a position to make decisions about legal representation. *Cf.* Standard (3). **KEM Recommendation**: Keep paragraph (c) as it is in the ABA Model Rule. Rule 1-400 has Standard (5), but paragraph (c) specifically addresses

direct-targeted mailings, which probably should be in the rule proper. **Standard (5)** provides: "(5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word 'Advertisement,' 'Newsletter' or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word 'Advertisement,' 'Newsletter' or words of similar import on the outside thereof." Standard (5) could be included in the Discussion.

26. Paragraph (d) appears to run afoul of Cal. Rule 13.3 of the RULES AND REGULATIONS PERTAINING TO LAWYER REFERRAL SERVICES (Appendix B to Publication 250), which provides: "13.3 No referral shall be made which violates any provision of the State Bar Act or Rules of Professional Conduct, including, but not limited to, restrictions against unlawful solicitation and false and misleading advertising." **KEM Recommendation**: I don't think the conduct allowed in paragraph (d) is something that should be discouraged. I recommend that the Commission adopt this concept and/or language and in its report, recommend that standard 13.3 be amended.

27. **KEM Note**: The Ethics 2000 MR 7.4 is nearly the same as the pre-2002 version of MR 7.4. Of the 17 states for which I currently have Ethics 2000 Reports, only two (Florida and Oregon) have not adopted MR 7.4 at all. In the case of Oregon, which is moving from the ABA Code to the Model Rules, its Ethics 2000 Commission has addressed specialization in proposed Oregon Rule 7.1. Florida had an extensive set of advertising rules before Ethics 2000; its Ethics 2000 Commission has declined to adopt the Ethics 2000 approach and recommended that Florida keep its own rules. Of the remaining 15 states, all of them except Indiana and Louisiana have a specific reference to Patent and Admiralty law, with two (Illinois and So. Carolina) also referring expressly to "Trademark Law". The greatest variation is found in rule 7.4(d) due to the states various approaches to specialization and certification.

28. Montana adds the following sentence to its rule 7.4(a): "A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, if such communication does not imply an unwarranted expertise in the field so as to be false or misleading under Rule 7.1." **Question**: Should California also include a similar concept either in (1) the rule proper; or (2) the Discussion?

29. As noted above, nearly all states that have adopted or recommended the Ethics 2000 rule 7.4 include references to Patent and Admiralty law specialties. South Carolina covers both, as well as Trademark lawyers, in a single paragraph: (d) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designations "patents," "patent attorney," "patent lawyer," or any combination of those terms. A lawyer engaged in a trademark practice may use the designations "trademarks," "trademark attorney," or any combination of those terms. A lawyer engaged in admiralty practice may use the designations "admiralty," "proctor in admiralty," "admiralty attorney," or any combination of those terms. **KEM Recommendation**: California should include reference to the Patent and Admiralty specialties. There is no good reason not to use the ABA language.

30. **MR 7.4(d)(1)** provides: "(1) the member has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association." I have replaced that language with language from rule **1-400(D)(6)**. **KEM Recommendation**: Use the language I have inserted from Rule 1-400(D)(6), which provides: "(D) A communication or a solicitation (as defined herein) shall not: * * * (6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification." It more accurately reflects the California situation.

31. The closest analogy in California to paragraph (a)'s first sentence is Standard (9) to rule 1-400, which provides the following is a presumed violation of rule 1-400: "(9) A 'communication' in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community." **KEM Recommendation**: use the ABA language. Standard (9) can be included in the Discussion.

32. The closest analogy to paragraph (a)'s second sentence in California is Standard (6) to rule 1-400, which provides the following is a presumed violation of rule 1-400: "(6) A 'communication' in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization." **KEM Recommendation**: use the ABA language. Standard (6) can be included in the Discussion.

33. According to the Ethics 2000 Reporter's Explanation of Changes for rule 7.5, the phrase "other professional designation" was added to paragraph (b) "to clarify that the Rule applies to website addresses and other ways of identifying law firms in connection with their use of electronic media." It should be noted, however, that the phrase appeared in paragraph (a) of 7.5 before Ethics 2000.

34. The ABA language has been left intact, as has been done by other states that have adopted MR 7.5. One possibility would be to change paragraph (b) slightly to read: "A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm in California shall indicate the jurisdictional limitations on those not licensed to practice in California." **KEM Recommendation**: Keep the ABA language; there's no pressing need to make the provision California-specific, especially as no other state has done so. **Note**: There is no provision in California analogous to MR 7.3(b).

35. The closest analogy to paragraph (c) in California is Standard (6) to rule 1-400, which provides the following is a presumed violation of rule 1-400: "(6) A 'communication' in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization." **Note**: This provision is not really analogous, as paragraph (c) seeks to prevent a firm from using the name of a person who is in government service, while Standard (6) applies only to a "member in private practice." **KEM Recommendation**: Use the ABA language, even though using the name of a former partner now in government service is already covered as "false" under rule 7.1.

36. The closest analogy to paragraph (d) in California is Standard (7) to rule 1-400, which provides the following is a presumed violation of rule 1-400: "(7) A 'communication' in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 unless such relationship in fact exists." I have substituted that language for ABA MR 7.5(d), which provides: "Members may state or imply that they practice in a partnership or other organization only when that is the fact." **Question**: Do you agree with the substitution? The more specific language of Standard (7) appears warranted here.

37. This provision has been added to the rule. The concept is currently contained in Standard (8) to rule 1-400, which provides the following is a presumed violation of rule 1-400: "A 'communication' which states or implies that a member or law firm is "of counsel" to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172) which is close, personal, continuous, and regular. **Question**: Do you agree with the addition?

38. The rule had its genesis in 1993, when the new chair of the SEC targeted "pay-to-play," the practice of brokers making political contributions to political candidates who, if elected, could influence the choice of underwriters on government projects. It was not adopted by the House of Delegates until 2000. I believe there had been a problem involving New York's Comptroller and the hiring of law firms to represent the state. Has there been a similar problem in California? When I researched the rules of all the states in early summer 2002, I discovered that not a single state had adopted rule 7.6. Of the seventeen states for which I have Ethics 2000 Reports, only four (Delaware, Idaho, Michigan and South Dakota) have adopted the rule or have had their Ethics 2000 review commissions recommend its adoption. The rule has been lumped with the advertising rules because of its relationship to MR 7.2(b) (which prohibits lawyers from paying others to recommend their services). **KEM Recommendation**: Do not adopt.

## RULE 7.0. DEFINITIONS

(a) For purposes of this chapter, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a member's law firm directed to any former, present, or prospective client, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, **domain name**, or other professional designation of such member or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, **internet web page or web site, e-mail, or other written document sent by electronic transmission,** or other comparable written material describing such member, law firm, or lawyers; or

(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or

(4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

(b) For purposes of this chapter, "Advertise" or "advertisement" means any communication, disseminated by television or radio, **or any other electronic medium, including a computer network**, or by any print medium including, but not limited to, newspapers and billboards, or by means of a mailing directed generally to members of the public and not to a specific person, that solicits employment of legal services provided by a member, and is directed to the general public and is paid for by, or on the behalf of, an attorney.

(c) For purposes of this chapter, **to "solicit" or** a "solicitation" means **the initiation of** any communication:

(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and

(2) Which is:

(a) delivered in person or by **live** telephone, **or through real-**

**time electronic contact**, or

(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

(D) "Electronic medium" **includes, without limitation,** ~~means~~ television, radio, ~~or~~ **and** computer networks."

**RULE 7.1~~:~~. COMMUNICATIONS CONCERNING A ~~LAWYER'S~~MEMBER'S SERVICES**

(a) A ~~lawyer~~member shall not make a false or misleading communication about the ~~lawyer~~member or the ~~lawyer's~~member's services.~~–~~

(b) A communication is false or misleading if it ~~contains a material misrepresentation of fact or law, or omits a~~:

(1) Contains any [**material**] untrue statement; or

(2) Contains any matter, or present or arrange any matter in a manner or format which is [**materially**] false, deceptive, or which confuses, deceives, or misleads the public; or

(3) Omits to state any fact necessary to make the ~~statement considered as a whole not materially misleading.~~

**~~RULE 7.2:~~**statements made, in the light of circumstances under which they are made, not [**materially**] misleading to the public.

(c) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

(d) A member shall retain for two years [one year] a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

**Comment**

## RULE 7.2. ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a ~~lawyer~~member may advertise services through written, recorded or electronic communication, including public media.

(b) A ~~lawyer~~member shall not give anything of value to a person for recommending the ~~lawyer's~~member's services except that a ~~lawyer~~member may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service ~~that has been approved by an appropriate regulatory authority; and~~ established, sponsored and operated in accordance with the State Bar of California's minimum standards for a lawyer referral service in California;

(3) pay for a law practice in accordance with ~~R~~rule ~~1.17.~~2-300; and

(4) refer clients to another ~~lawyer~~member or a ~~nonlawyer~~nonmember professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the ~~lawyer~~member, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one ~~lawyer~~member or law firm responsible for its content.

## RULE 7.3~~:~~. DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A ~~lawyer~~member shall not by in person or, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the ~~lawyer's~~member's doing so is the ~~lawyer's~~member's pecuniary gain, unless **[the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California or]** the person contacted:

(1) is a lawyer; or

(2) has a family, **close personal**, or prior professional relationship with the ~~lawyer~~member.

(b) A ~~lawyer~~member shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in person, telephone or **real-time electronic contact** even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the ~~lawyer~~member a desire not to be solicited by the ~~lawyer~~member; or

(2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or ~~harassment~~harassing conduct.

(c) Every written or, recorded or electronic communication from a ~~lawyer~~member soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words ~~"Advertising~~"Advertising Material~~"~~" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a ~~lawyer~~member may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the ~~lawyer~~member that uses in person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

## RULE 7.4~~:~~. COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

(a) A ~~lawyer~~member may communicate the fact that the ~~lawyer~~member does or does not practice in particular fields of law.

(b) A ~~lawyer~~member admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;~~.~~

(c) A ~~lawyer~~member engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A ~~lawyer~~member shall not state or imply that a ~~lawyer~~member is certified as a specialist in a particular field of law, unless:

(1) the ~~lawyer has been certified~~member holds a current certificate as a specialist ~~by an organization that has been approved by an appropriate state authority or that has been~~issued by the Board of Legal Specialization, or any other entity accredited by the ~~American Bar Association~~State Bar to designate specialists pursuant to standards adopted by the Board of Governors; and

(2) the name of the certifying organization is clearly identified in the communication.

**RULE 7.5~~:~~. FIRM NAMES AND LETTERHEADS**

(a) A ~~lawyer~~member shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a ~~lawyer~~member in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a ~~lawyer~~member holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the ~~lawyer~~member is not actively and regularly practicing with the firm.

(d) ~~Lawyers~~A member may state or imply that ~~they practice in a partnership or other organization only when that is the fact.~~

~~**RULE 7.6:**~~the member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172 only when such relationship in fact exists.

(e) A member may state or imply that the member or member's law firm is "of counsel" to another lawyer or a law firm only if the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172) which is close, personal, continuous, and regular.

## RULE 7.6. POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES

~~A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.~~

## ENDNOTES

See endnotes provided above in the “clean” version of these rules, or refer to hard copy of agenda.

**Current Standards Related to Advertising (Rule 7.2):**[1]

(1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation. **[ADVERTISEMENT]**

(2) A "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter." **[ADVERTISEMENT]**

(5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word "Advertisement," "Newsletter" or words of similar import on the outside thereof.[2] **[ADVERTISEMENT/SOLICITATION]**

(10) A "communication" which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case. **[ADVERTISEMENT]**

(12) A "communication," except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it. **[ADVERTISEMENT]**

(13) A "communication" which contains a dramatization unless such communication contains a disclaimer which states "this is a dramatization" or words of similar import. **[ADVERTISEMENT]**

(14) A "communication" which states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs. **[ADVERTISEMENT]**

(15) A "communication" which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case. **[ADVERTISEMENT]**

(16) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. **[ADVERTISEMENT]**[3]

**Current Standards Related to Direct Contact With Clients (Rule 7.3):**[4]

(3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel. **[SOLICITATION]**

(4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility. **[SOLICITATION]**

(5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word "Advertisement," "Newsletter" or words of similar import on the outside thereof. **[ADVERTISEMENT/SOLICITATION]**[5]

**Current Standards Related to Rule 7.5 ("Firm Names & Letterheads"):**6

(6) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization. **[ADVERTISEMENT/LETTERHEAD]**

(7) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172 unless such relationship in fact exists. **[ADVERTISEMENT/LETTERHEAD]**

(8) A "communication" which states or implies that a member or law firm is "of counsel" to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172) which is close, personal, continuous, and regular.**[ADVERTISEMENT/LETTERHEAD]**

(9) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community. **[ADVERTISEMENT/LETTERHEAD]**

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## ENDNOTES

1. **Question**: I've listed current standards that appear to be addressed primarily to advertising as distinguished from solicitation (direct contact with a prospective client, now covered in proposed rule 7.3, below.) I've added these for your opinion on (1) whether the concepts should be included in either the rule or the Discussion to 7.2, or (2) whether they are better placed in rule 7.1 on "communications" generally. Please note that standards 1,2, 10, 13-16 have no counterparts in the ABA rules, though some of the concepts are addressed in the Comments to the Model Rules.

**KEM Recommendation**: The substance of the current standards are probably best placed in the Discussion. **Question**: If placed in the Discussion, would the standards maintain their "presumptive effect"? Probably, so long as that statement is made somewhere in the rules. *E.g.,* rule 7.1(c).

2. **Note**: I've treated the letters described in Standard (5) as advertisements, directed to the public in general. Direct targeted mailings to prospective clients are more of a hybrid situation and are covered in rule 7.3(c) ("direct contact with a prospective client"). *See, e.g.*, *Shapero v. Kentucky Bar Ass'n* (1988) 486 U.S. 466, 108 S.Ct. 1916. *See also* discussion at

note 28, *below*.

3. See also B&P Code § 6158.2, which includes a laundry list of what kind of advertisements are presumed within the code. Note that the laundry list approach to what kind of information is allowed was abandoned by the ABA with the Model Rules in 1983. Prior to that time, ABA Model Code of Professional Responsibility, Disciplinary Rule 2-101(B), set out 25 permitted categories of advertising. The items listed in the paragraph are described as presumptions and do not preclude other subjects of advertising, so there should be no First Amendment problems with the list.

> **KEM Recommendation**: Do not include the laundry list from 6158.2. Better to stick with rule 1-400's standards as presumptions. The Model Rules take the better approach: essentially they prohibit communications that are false and misleading, with the presumption that anything else is permitted. A laundry list of what is permitted suggests that anything not on the laundry list is prohibited and would probably be less sensitive to First Amendment concerns.

4. I've listed current standards that appear to be addressed primarily to solicitation as distinguished from advertising. I've added these for your opinion on (1) whether the concepts should be included in either the rule or the Discussion to 7.3, or (2) whether they are better placed in rule 7.1 on "communications" generally. **Note** that part of Standard (5) is already incorporated into rule 7.3(c).

> **KEM Recommendation**: The substance of the current standards are probably best placed in the Discussion. **Question**: If placed in the Discussion, would the standards maintain their "presumptive effect"?

5.This standard's concept has been incorporated into rule 7.3(c).

6.These standards's concepts have all been incorporated in rule 7.5.